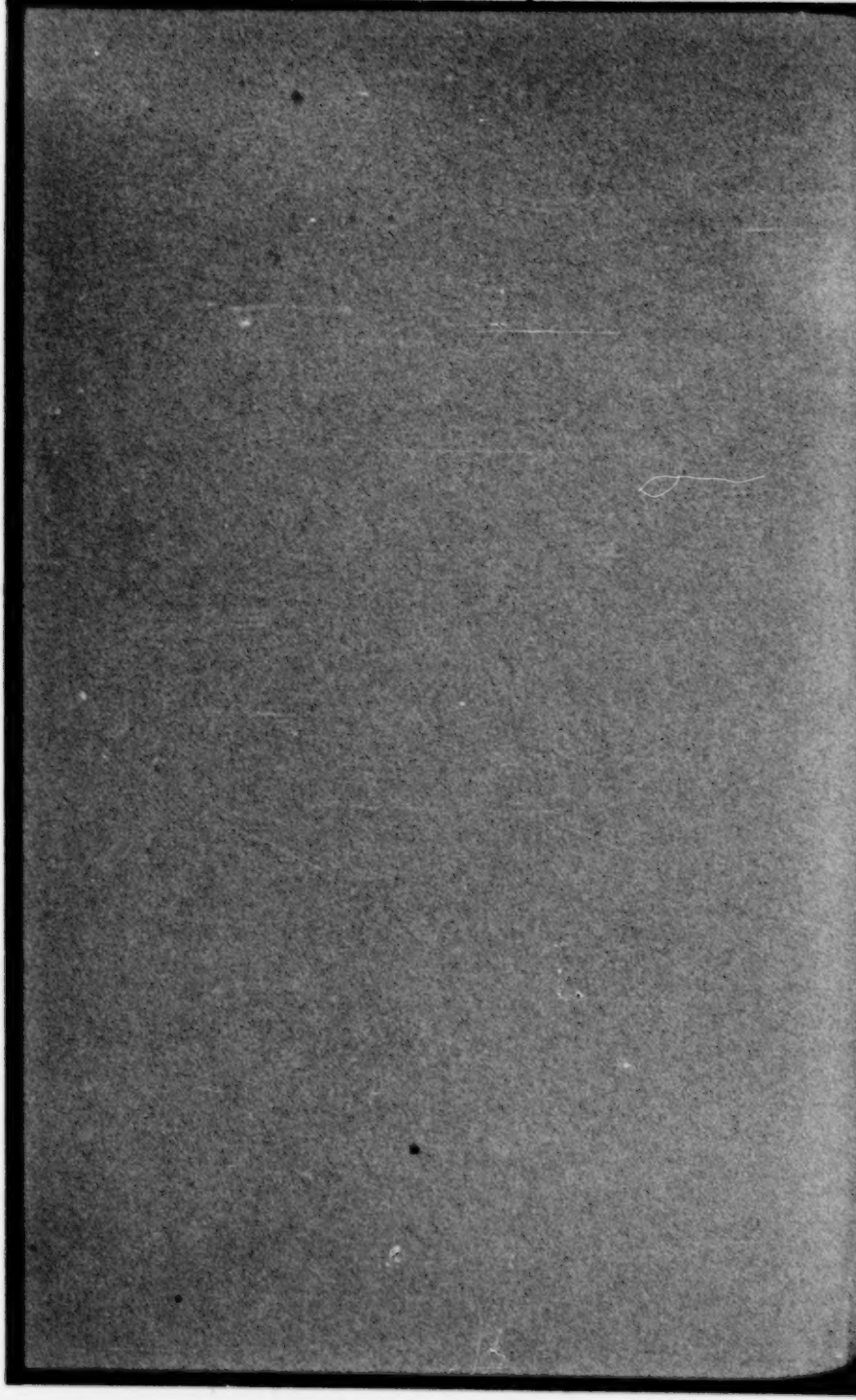

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 142.

JAMES W. WUCHTER,

Plaintiff-in-Error,

vs.

MICHAEL PIZZUTTI,

Defendant-in-Error.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

BRIEF FOR DEFENDANT-IN ERROR.

PREVIOUS OPINION IN THE PRESENT CASE.

The opinion of the New Jersey Court of Errors and Appeals in this case which was taken on a writ of error is not yet officially reported. The opinion, however, is reported in 134 Atlantic Reports 727, and printed in full (R. 12-18).

GROUNDS OF JURISDICTION.

This writ of error relates to a judgment entered in the New Jersey Court of Errors and Appeals on October 27, 1926 (R. 19).

The specific claims advanced and rulings made in t
lower court, which are relied upon as the basis of th
Court's jurisdiction, are set forth in the assignment
errors (R. 20-23) and the statement of points to be reli
upon (R. 24).

The jurisdiction of this Court is invoked and base
upon section 237 of the Judicial Code, Code of Gener
Laws, title 28, section 344, page 906.

STATEMENT OF THE CASE.

This was an action in tort brought by Michael Pizzut
a resident of Summit, in the State of New Jersey, again
James W. Wuchter, a resident of Allentown, in the Sta
of Pennsylvania, to recover compensation for person
injuries and property damage which the said Pizzut
sustained in an accident which occurred on September 1
1925, on a public highway in Essex County, New Jerse
when a motor vehicle driven by the said Wuchter collide
with a horse and wagon driven by the said Pizzutti.

Service was made upon the defendant by delivery
the summons and complaint by the Sheriff upon the Secr
tary of State (R. 3), and the Secretary of State, in turn
on November 19, 1925, mailed said summons and com
plaint to the address of Wuchter at #103 South Madiso
street, Allentown, Pennsylvania, and no return of th
summons and complaint was made to the Secretary
State, or were the papers returned to his office by the Po
Office authorities. The affidavit of mailing by the Secr
tary of State, and the affidavit of Jacob R. Mantel, a
torney of the said Pizzutti, were not included in th
record of the case, but it is now presented to this Cour
to be included in the record of this case by a motion pr
sented at this argument, and liberty is now taken to in
form the Court that the plaintiff-in-error has agreed tha
the summons and complaint in this case was mailed to th

defendant at his address, #103 South Madison street, Allentown, Pennsylvania, on November 19, 1925, and received by plaintiff-in-error and that no steps were taken by him upon receipt of the said summons and complaint. Defendant-in-error, in proceeding with the process in bringing this suit, complied with Chapter 232 of the Laws of 1924, of New Jersey, pertinent parts of which are:

> "1—From and after the passage of this act any chauffeur, operator or owner of any motor vehicle, not licensed under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey against such chauffeur, operator or the owner of such motor vehicle, arising out of or by reason of any accident or collision occurring within the State in which a motor vehicle operated by such chauffeur, or operator, or such motor vehicle is involved.
>
> 4. This act shall be construed to extend the right of service of process upon non-residents and shall not be construed as limiting any provision for the service of process now or hereafter existing."

On January 6, 1926, the defendant, not having appeared or made any reply to said summons and complaint served upon him, interlocutory judgment by default was entered against him (R. 3).

On January 16, 1926, Mr. Wuchter was personally served at Allentown, Pennsylvania, with notice that a writ of inquiry of damages would be executed on the 27th day of January, 1926, at the Court House, Elizabeth, New Jersey (R. 4).

The damages were thereafter assessed by a sheriff's jury and another notice was served upon Mr. Wuchter, personally, at Allentown, Pennsylvania, that application would be made for entry of final judgment (R. 7), on the 13th day of February, 1927, and on that day judgment was entered for $770.25 and $86.22 costs, making a total of $856.47 (R. 9). Defendant, Wuchter, made no appearance whatsoever, and on the 8th day of March, 1926, the defendant, Wuchter, took an appeal to the Court of Errors and Appeals of the State of New Jersey (R. 9).

The judgment of the New Jersey Supreme Court was affirmed in the New Jersey Court of Errors and Appeals on October 27, 1926 (R. 19) and a writ of error was thereupon allowed on November 3, 1926 (R. 19).

ARGUMENT.

POINT I.

This case is controlled by the decision in Hess vs. Pawloski.

The point herein raised by the plaintiff-in-error is not set forth in the grounds of appeal (R. 10-11); assignment of errors (R. 20-23) and the statement of points to be relied upon (R. 24).

This writ of error was allowed before the decision in the case of Hess vs. Pawloski. As heretofore stated, it is admitted that the Secretary of State of the State of New Jersey did mail the summons and complaint to the defendant and the same was received by the defendant. Failure to include the same in part of the record was be-

cause the defendant did not raise the question on his appeal from the New Jersey Supreme Court to the Court of Errors and Appeals and application is now made to this Court to include the same in this record.

This point was not raised in the New Jersey Court of Errors and Appeals and, it is respectfully submitted, cannot be raised in this Court, because the same does not come within the purview of the statement of points to be relied upon (R. 24).

It is, however, contended that the New Jersey Court of Errors and Appeals committed no error in affirming the decision of the New Jersey Supreme Court. The case of Hess *vs.* Pawloski is depositive of this case and the question is, whether the New Jersey statute is a reasonable use of the police power. It does not deprive the plaintiff-in-error of his property without due process of law.

> Hess *vs.* Pawloski, 274 U. S. 352 (1927);
> State *vs.* Belden (Wisconsin), 211 N. W. 916 (1927).

The State can, by barring non-residents from using its highways with motor vehicles, subject violators to regulations and be penalized.

> Kane *vs.* New Jersey, 242 U. S. 160 (1916).

There is no question but that the State may forbid a non-resident to do certain acts within the State involving the danger to life and property unless he first consents to the exercise of the jurisdiction of the courts of the State as to causes of action out of these acts.

> Hess *vs.* Pawloski, 274 U. S. 352 (1927);
> Kane *vs.* New Jersey, 242 U. S. 160 (1916);
> Pawloski *vs.* Hess, 250 Mass. 22-29 (1925);

State *vs.* Belden (Wisconsin), 211 N. W. 916 (1927).

All persons are presumed to know the law and when a non-resident enters the State of New Jersey and proposes to use the highways for motoring, he does, by virtue of this Statute, submit himself to the jurisdiction of the courts of the State of New Jersey, and subjects himself to regulation enacted in the interest of public safety as to the use of his automobile while in the foreign State.

Hendrick *vs.* Maryland, 235 U. S. 610 (1914);
Kane *vs.* New Jersey, 242 U. S. 160 (1916);
Packard *vs.* Banton, 264 U. S. 140 (1923).

Justice Butler in Hess vs. Pawloski said:

> "The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment."

The vital question raised by the plaintiff-in-error in Point I is whether the New Jersey Statute has afforded fully opportunity for a hearing and defense to defendant. This question is answered in the affirmative in the case of Missouri *vs.* North, 271 U. S. 40-41 (1926), wherein Mr. Justice Stone says:

> "It has been so often pointed out in the opinions of this Court that the Fourteenth Amendment is concerned with the substance and not with the forms of procedure to make unnecessary any extended discussion of the question here presented. The due process clause does not guarantee to a citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice, and reasonable opportunity to be heard and to present his claim or

> defense; due regard being had to the nature of the proceedings and the character of the rights which may be affected by it."

In passing this point, it is well to understand that plaintiff-in-error was informed of a pending cause of action in which he was involved. Such information was conveyed to him by virtue of personal service upon him in the State of Pennsylvania, informing him of the various orders of the Court before and after they were entered.

The form of service in this cause has given the non-resident motorist full notice and ample opportunity for defense. Preserving these rights, the State is wholly within its power in providing methods of procedure.

> "As the law is that the process shall be served upon the public officer * * * we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void in a case where the process was so served."
>
> Becquet *vs.* McCarthy, 2 B. & Ad. 951 at 959 (1831).

After all, what has the plaintiff-in-error to complain of, when we amass the many opportunities afforded him to step in and defend the action, viz:

> (1) When the summons and complaint were first served upon him by the Secretary of State by mail.
>
> (2) Notice that a writ of inquiry of damages would be executed, personally served upon the plaintiff-in-error, at his residence in Allentown, Pennsylvania (see affidavit of John H. Diefenderfer (R. 4).
>
> (3) Notice of motion for final judgment, personally served upon the plaintiff-in-error at his residence in Allentown, Pennsylvania (see affidavit of John H. Diefenderfer (R. 8).)

He did nothing until judgment final was entered, then he appeared.

In the case of City of Chicago *vs.* Sturges, 222 U. S. 313, 56 L. Ed. 215, an Illinois statute provided for indemnifying the owners of property for damages occasioned by mobs and riots by compelling the city to pay over three-fourths of the damage resulting. It was argued that such a statute denies to the city due process of law. The Court said:

> "The law provides for a judicial hearing. If such legislation be reasonably adapted for the end in view, afford a hearing before judgment and is not forbidden by some other affirmative provision of constitutional law it is not to be regarded as denying due process of law under provisions of the 14th Amendment."

In New Jersey, in actions in tort, as was the situation here, it is required that before the plaintiff executes his writ of inquiry that a notice be served upon the defendant and also, as in this case, the damages being assessed by writ of inquiry, no judgment thereon can be entered without notice thereof being given to the defendant. The pertinent statute in question is to be found in 3 New Jersey Compiled Statutes, pages 4096-4097, sections 138-139, New Jersey Public Laws, 1903, page 575, as follows:

> "Sec. 138—Notice of writs of inquiry.—The same notice shall be given of executing writs of inquiry and of countermand as is required for the trial of issues of fact; if the plaintiff shall not execute the writ of inquiry according to notice or countermand such notice in due time, the defendant shall be entitled to costs (P. L. 1903, p. 575).

Sec. 139—Final judgment; entry.—If the damages are assessed by a writ of inquiry, no rule for final judgment shall be entered, except by order of the Court or a judge on notice to the defendant; but if the damages are assessed by the Court or a judge or the clerk, a rule for final judgment may be entered upon filing such assessment as of course, which judgment shall be signed and take effect as of the day when such rule is actually entered (P. L. 1903, p. 575)."

It will therefore be observed that the plaintiff-in-error was given reasonable notice of this action by the service upon him of the notice of the writ of inquiry (R. 4) and notice of motion for final judgment (R. 7).

POINT II.

The New Jersey Statute is not repugnant to Article IV, Section 2 of the Constitution.

This point was not raised in the Statement of Points (R. 24).

Let us quote that portion of the New Jersey Statute that embodies the language involved on the point argued under Point II of the plaintiff-in-error, which provided, *inter alia*:

"Any chauffeur, operator or owner of any motor vehicle, not licensed, under the laws of the State of New Jersey, providing for the registration and licensing of motor vehicles, who shall accept the privilege extended to non-resident chauffeurs, operators and owners by law of driving such a motor vehicle or of having the same driven or operated in the State of New Jersey, without a New Jersey registration or license, shall, by such acceptance and the operation of such automobile within the

> State of New Jersey, make and constitute the Secretary of State of the State of New Jersey, his, her or their agent for the acceptance of process in any civil suit or proceeding by any resident of the State of New Jersey, against such chauffeur, operator or the owner of such motor vehicle."

Nowhere is there directed a prohibition against a non-resident from taking advantage of the New Jersey Statute.

The Statute of the State is presumed to be lawful and not prejudiced to the rights of the citizens of the several States. Inasmuch as the Statute is absolutely silent as to the query whether a non-resident may secure the benefit of the New Jersey Statute and in no way restricts the non-resident by a negative suggestion, the Statute must be construed as constitutional.

The constitutionality of this Statute could only be called into question where the State of New Jersey would refuse to recognize a suit instituted on behalf of a non-resident against another non-resident, wherein the New Jersey Statute was involved, but that is not the case here:

> "The omission of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The maxim, *ubi ibi remedium*, is as old as the law itself. Accordingly, it has been decided that if a state constitution declares that a liability shall exist in certain specified circumstances, an action may be maintained to enforce such liability, without there being any legislation upon the subject. This is upon the principle that if a constitutional right has no statute especially adapted to enforce it, by its own inherent potency it enforces itself."
>
> 6 R. C. L. Constitutional Law, par. 56, page 60;
> State *vs.* Warner, 165 Mo. 399.

And likewise it follows that:

> "To justify a court in pronouncing a legislative act unconstitutional, or a provision of a state constitution to be in contravention to the Constitution of the United States, the case must be so clear as to be free from doubt, and the conflict of the statute with the constitution must be irreconcilable, because it is but a decent respect to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until the contrary is shown beyond reasonable doubt. Therefore in no doubtful case will the judiciary pronounce a legislative act to be contrary to the constitution. To doubt the constitutionality of a law is to resolve the doubt in favor of its validity."
>
> 6 R. C. L. Constitutional Law, par. 73, page 75; Fairbanks *vs.* United States, 181 U. S. 283.

Even though the New Jersey Statute does not expressly give the benefits thereof to a non-resident, the right can be clearly implied.

> "An important corollary of the general principle is the rule that a statute need not be treated as unconstitutional or void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limits without necessitating a decree that the act itself is void • • • and that where the legislature of a state has made no limitations or exception, the legal presumption is that it is intended to make none."
>
> 6 R. C. L. Constitutional Law, par. 78, pages 80-81.

Let us suppose for an instant that the New Jersey Statute actually says that, "None but residents may bring suit under it," which it clearly does not.

The Statute was naturally and primarily drawn for the protection of those within the confines of its boundaries from the dangers which might arise from the unrestricted use of the roads of the State of New Jersey by the automobiles of non-residents.

The law does not differentiate between the citizens of the State of New Jersey and the citizens of any other State. All are equally compelled to obey regulations concerning motor travel, and all are equally liable in its courts.

> "It is not a discrimination against non-residents, denying them equal protection of the law; on the contrary, it puts non-residents upon the equality with resident owners."
>
> Kane *vs.* New Jersey, 242 U. S. 160;
> Chalmers *vs.* B. & O. R. R., 207 U. S. 142.

The Statute here attacked does not abridge the privilege or immunities of citizens of the United States.

The privileges and immunities of citizens of the United States are those which owe their existence to the Federal Government, its national character, its Constitution or its laws, and it is only these privileges and immunities that are placed by this amendment under the protection of Congress. This clause of the Fourteenth Amendment did not transfer the security of a citizen's civil rights from the States to the Federal Government. Moreover, the highways of the State, to which the Statute applies, are controlled by the State under its own sovereign power and not under any delegated power of the Constitution.

> "Decisions of this Court, familiar to all, and which need not be cited, recognize the possession,

by each State, of powers never surrendered to the General Government, which power the State, except as restrained by its own Constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people." Per Mr. Justice Harlan.

Western Turf Ass'n *vs.* Greenberg, 204 U. S. 360, 363 (1906).

The States have always enjoyed this authority. Hence the privilege of using the highways of a State by motor vehicles never was nor ever can be, under our fundamental law, a privilege common to all United States citizens, by virtue of such citizenship.

Slaughter House Cases, 16 Wall U. S. 36, 72 (1872);

New Orleans Gas Co. *vs.* La. Gas Co., 115 U. S. 650-661 (1885);

Blake *vs.* McClung, 172 U. S. 239 at 249 (1898);
Maxwell *vs.* Dow, 176 U. S. 581 at 593 (1899);
Twining *vs.* New Jersey, 211 U. S. 78, 99 (1908);
Maxwell *vs.* Bugbee, 250 U. S. 525 at 537 (1919).

When a non-resident enters the highways of another State, he does so by license or permission. The non-resident is not stopped from suing another non-resident on account of an accident arising in the State of New Jersey. The aggrieved non-resident may follow the malfeasant non-resident to the latter's own State and secure redress without difficulty. It is true the unfortunate non-resident is subjected to somewhat of a handicap if he were not able to take advantage of the New Jersey Statute.

But where the status of the injured non-resident is merely that of a user of the New Jersey highways in the

capacity of a license and is granted that license as a matter of courtesy, he cannot complain of the hardship that might be vested on him in following the other resident to the latter's State.

> "If non-residents feel the law harsh they can easily avoid its operation, so far as they are concerned, by refraining from operating their automobiles within the territorial limits of the States which have enacted such laws."
>
> Pizzutti *vs.* Wuchter, 134 Atl. 727 (1926).

> "The guaranty of equal privileges and immunities to citizens of the United States by the Fourteenth Amendment does not limit the power of the State government over the rights of its own citizens, or its power to regulate the special privileges which such State may confer on them."
>
> Steed *vs.* Harvey, 18 Utah 367;
>
> 6 R. C. L. Constitutional Laws, par. 266, page 282.

> "The State may grant special privileges to its own citizens, or it may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States."
>
> Paul *vs.* Virginia, 8 Wall 168, 19 U. S. (Lawyers' Edition) 357;
>
> Presser *vs.* Illinois, 116 U. S. 252;
>
> 6 R. C. L. Constitutional Laws, par. 266, page 282.

> "There are numerous privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States to sue in its courts, that right being enjoyed by its own people;

but it may require a non-resident, although a citizen of another State, to give a bond for costs, although such bond be not required of a resident."

Blake *vs.* McClung, 172 U. S. 239.

"As between residents and non-residents, it has been held that the rights of a non-resident to sue on a parity with residents in the courts of a State is NOT one of the privileges and immunities granted to citizens of the several States by the Federal Constitution."

6 R. C. L. Constitutional Law, par. 272, page 286, line 10;

Robinson *vs.* Ocean Steam Nav. Co., 112 N. Y. 315.

"The Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adapted for these purposes gives reasonable notice and affords fair opportunity to be heard before issues are decided. Hence it is not a right, privilege or immunity of a citizen of the United States to have a controversy in a State Court procedure or determined by one form of action instead of by another."

6 R. C. L. Constitutional Law, par. 272, page 286, line 15;

Iowa *vs.* Iowa, 160 U. S. 389.

The action of the State must be treated as correct unless the contrary is clearly made to appear. Every presumption is to be indulged in favor of the validity of the Statute.

Hendrick *vs.* Maryland, 238 U. S. 610 at 624 (1914);

U. S. *vs.* Jin Fuey, 241 U. S. 394 at 401 (1916);

Graves *vs.* Minnesota, 47 Sup. Ct. 122 at 123 (1926);

Interstate Bus *vs.* Holyoke St. Ry. Co., 47 Sup. Ct. 298 (1926).

In respect to the point that the burden is imposed upon the non-residents and not upon the residents, and so unconstitutional inequality is created, it is sufficient to say that both residents and non-residents are placed upon the same footing, both are made amenable to the laws of the State, whose highways they are using.

And, finally, Mr. Justice Butler, in Hess *vs.* Pawloski, says, *inter alia*:

> "It makes no hostile discrimination against non-residents but tends to put them in the same footing as residents. *Literal and precise equality in respect of this matter is not attainable; it is not required.* (Italics mine.)
>
> Canadian Northern Ry. Co. *vs.* Eggen, 252 U. S. 553, 561, 562."

No error of law prejudicial to the fundamental rights of the plaintiff-in-error is disclosed in the record. The Court of Errors and Appeals of New Jersey heard substantially the same arguments as those addressed to this Court. In an able opinion the validity of the Statute here involved was upheld and it is respectfully submitted that the writ should be dismissed with costs.

Respectfully submitted,

JACOB R. MANTEL,
Counsel for Defendant-in-Error.